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NO. 91-1950

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

AMERICAN DREDGING COMPANY
Petitioner,

vs.

WILLIAM ROBERT MILLER
Respondent.

On Writ of Certiorari To
The Supreme Court of the State of Louisiana

REPLY BRIEF OF PETITIONER, AMERICAN DREDGING COMPANY

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QUESTION PRESENTED

The question presented is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "savings to suitors" clause.

LIST OF PARTIES

The parties to the action are William Robert Miller and American Dredging Company.

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OPINIONS BELOW

All opinions below are contained in the Joint Appendix. The opinion of the trial court, the Civil District Court for Orleans Parish in Louisiana, is reproduced in the Joint Appendix, pp. 51, 52. Its judgment, dismissing the suit on the basis of petitioner's exception and maritime defense of *forum non conveniens*, appears in the Joint Appendix, pp. 49, 50. The opinion of the Louisiana Fourth Circuit Court of Appeal, affirming the trial court judgment, is reported at *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991) and is reproduced in the Joint Appendix, pp. 53-57. The Louisiana Supreme Court's opinion, reversing the appellate court and the trial court judgment, is reported at *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). It is reproduced in the Joint Appendix, pp. 58-67.

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court was entered on March 2, 1992. The petition for certiorari was filed on May 29, 1992, and this Court granted certiorari on April 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (West Supp. 1992).

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; -to Controversies between two or more States; - between a State and Citizens of another state; between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C.A. § 1333 (West 1949), commonly known as the "saving to suitors" clause, provides as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Louisiana Code of Civil Procedure Article 123 provides as follows:

> A. For the convenience of the parties and witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C.A. § 688 or federal maritime law.

STATEMENT OF CASE

American Dredging Company (American Dredging), petitioner, adopts the Statement of Case presented in its brief on the merits.

ARGUMENT

I. There is No Reasonable Basis to Apply Different Maritime Rules for Claims of American and Foreign Plaintiffs or Defendants

William Robert Miller (Miller), respondent, contends that Article 123 of the Louisiana Code of Civil Procedure may prohibit application of the maritime doctrine of *forum non conveniens* to the Jones Act and maritime claims of American seamen against American corporate employers for injuries aboard American vessels in American waters although a different rule may be applicable for claims invoking foreign interests.[1] However, Jones Act and maritime remedies are available to both American and foreign seamen (*Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953) and *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, *reh'g denied*, 400 U.S. 856, 91 S. Ct. 23 (1970)); and Miller does not oppose the application of this doctrine to Jones Act and maritime claims of foreign seamen.[2] Miller's interpretation of Louisiana law would require application of different rules to maritime suits depending upon whether the claimant or employer was American or foreign. American Dredging respectfully replies that such fragmentation of maritime law is neither necessary nor consistent with the goals of uniformity.

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[1] *See* Miller's Brief, pp. 4, 5, 11 and 12. *See also* argument of Amicus, Solicitor General, that doctrine is "principally related to foreign parties . . . ," Brief at pp 16-17.

[2] *See, e.g. Gazis v. John S. Latsis, Inc.*, 729 F.Supp. 979 (S.D.N.Y. 1990); *Vargas v. M/V MINI LAMA*, 709 F.Supp. 117 (E.D.La. 1989); *Sherill v. Brinkerhoff Maritime Drilling*, 615 F.Supp. 1021 (N.D. Cal. 1985), involving American and foreign seamen claims arising out of an aircrash in Indonesia.

Significantly, Miller's interpretation is not premised upon any local concern or interest of Louisiana in protecting Louisiana claimants, regulating Louisiana employers or remedying Louisiana accidents.[3] Instead, Miller urges application of Louisiana law for purported national concerns involving American claimants and American employers. Initially, it is inappropriate to use Louisiana procedure to prohibit litigation of non-local interests in a convenient forum when the national legislation of Congress and the national jurisprudence of this Court and of lower federal courts provide for the transfer or dismissal of suits by or against American interests when they are filed in inconvenient fora. 28 U.S.C.A. § 1404 (West 1962); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947); *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947); *Alcoa S.S. Co., Inc. v. M/V NORDIC REGENT*, 654 F.2d 147 (2d Cir. 1980).

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[3] When there is such local interest, the doctrine permits the local forum to retain jurisdiction. However, as noted by the Ninth Circuit in *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954-955 (9th Cir. 1968), the "plaintiff's choice [of forum] is entitled to "minimal consideration" when "the forum has no particular interest in the parties or the subject matter" of the action.

In his brief on the merits, Miller attempts to cloak himself with local or Louisiana interests, alleging that while he moved from Mississippi to Pennsylvania only for employment, he maintained a separate family residence in Mississippi (p. 1), that American Dredging's underwriters appointed local counsel to defend the suit (p. 2), and that he is totally disabled, making long-distance travel "quite painful." (p. 12). Significantly, none of these contentions was urged in Miller's opposition filed with the trial court. *See*, generally Memorandum in Opposition to Defendant's Exceptions of Lack of Jurisdiction and, Alternatively, *Forum Non Conveniens*, J.A. pp. 31-42. In fact, American Dredging underwriters are not parties to the suit and could not even be sued directly under Louisiana's Direct Action Statute. L.S.A. R.S. 22:655.

Whatever justification is urged for disallowing a *forum non conveniens* dismissal when it would deny an American seamen the Jones Act remedy, Cf. *Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819, *reh'g denied*, 487 U.S. 1245, 109 S. Ct. 2 (1988), is inapposite in cases where the Jones Act and other maritime remedies are not impaired and will be applied with equal vigor in a forum which is both interested in the dispute and convenient to the parties, witnesses and sources of proof.[4] Further, nothing in the Louisiana statute limits its application to American claimants, American employers, American vessels, or incidents in American waters. La. Code Civ. Proc. Art. 123C. Indeed, in *Markzannes v. Bermuda, Star Cruise Line, Inc.*, 545 So.2d 537 (La. 1989), *cert. denied*, 493 U.S. 1043, 110 S.Ct. 837 (1990), the Louisiana Supreme Court compelled the trial court in Orleans Parish to adjudicate the claim of a Greek seaman against a Cayman Islands defendant for injuries or illnesses sustained

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[4] Miller's argument for an exception to application of *forum non conveniens* is actually accommodated within the doctrine itself. The forum analysis by the trial court takes into account the nationality and residence of the parties and the availability of the witnesses and sources of proof. Further, as the Court noted in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981), *reh'g denied*, 455 U.S. 928, 102 S. Ct. 1296 (1982), the trial court must initially determine whether there is an alternative forum and the court may retain jurisdiction even in an inconvenient forum when the remedy available in the alternate forum is "so clearly inadequate or unsatisfactory that it is no remedy at all...." *Piper*, 102 S.Ct. at 265, 454 U.S. at 254. Therefore, dismissal under this doctrine would not be proper when the dismissal would deny the American claimant the Jones Act remedy against an American employer for injuries aboard an American ship in American waters. Such is not the case here.

aboard a Panamanian vessel, navigating on the high seas between Bermuda and Boston, Massachusetts. [5]

Louisiana's prohibition of the doctrine of *forum non conveniens* in maritime cases transcends state and national boundaries and directly impacts the cost, effort and efficiency of adjudication of maritime disputes arising in the ordinary course of national and international commerce. Other state courts have recognized the valuable role of this doctrine in directing maritime litigation to a convenient forum which is interested in the dispute. *Anderson v. Great Lakes Dredge and Dock Co.*, 411 Mich. 619, 309 N.W.2d 539 (Mich. S. Ct. 1981), Michigan court applying *forum non conveniens* to dismiss the Jones Act claim of a Florida resident for an injury in Florida; *Vargas v. A. H. Bull*, 44 N.J. Super 536, 131 A.2d 39 (N. J. S. Ct. 1957), New Jersey court applying *forum non conveniens* to dismiss the Jones Act claims of a Puerto Rican resident for injuries in Puerto Rico; *Argandona v. Lloyd's Register of Shipping*, Case No. 92-7959 (Fla. 11th Cir. Ct., June 4, 1993), dismissing foreign seamen

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[5] The underlying facts in *Markzannes* are recited in the decision of the intermediate appellate court in *Markozannes v. Bermuda Star Line*, No. 88-C-2440 (La. App. 4th Cir. March 20, 1989 and April 19, 1989), *rev'd*, 545 So.2d 537 (La. 1989), *cert. denied* 493 U.S. 1043, 110 S. Ct. 837 (1990), which is reproduced in the Joint Appendix at pp. 27-29, 23-26.

The Louisiana statute is also not limited to injury and death actions. The specific wording of subsection C makes the Louisiana *forum non conveniens* rule inapplicable to "claims brought pursuant to [the Jones Act] or federal maritime law." La. C. Civ. Proc. Art. 123C. Accordingly, the Louisiana rule compels its courts to hear all claims arising under federal maritime law (i.e. collision and cargo claims, salvage cases, charter disputes, etc.) without regard to the convenience of the parties, the availability of witnesses, the location of the sources of proof or the forum's lack of interest in the dispute at bar.

personal injury claims under doctrine of *forum non conveniens*; *see also, In re: St. Croix Seamen's Asbestos Cases*, Nos. 606/92 et al (*Territ.* Ct. V. I., June 18, 1993), applying *forum non conveniens* to dismiss multiple Jones Act claims of American (mainland) claimants for asbestos related injuries. Even a Louisiana intermediate court, while chary to violate the tenets of Article 123 or evade the rulings of the Louisiana Supreme Court, recognized the "potential usefulness of the doctrine of *forum non conveniens* [to the maritime injury claims of a foreign seaman] should the [Louisiana] legislature ever decide to revise [Art. 123]...." *Prado v. Sloman Neptun Schiffahrts, A.D.*, 611 So.2d 691, 703 (La. App. 4th Cir. 1992).

Miller's plea for a separate Louisiana rule for Americans harkens back to the vices of the provincial approach of legislation and jurisprudence during the Article of Confederation.[6] Such a rule is the anathema of the goals of uniformity of maritime law. Fragmentation of maritime law to favor some local or even national interest is exactly the type of parochial protectionism disavowed by the Constitutional endowment of admiralty jurisdiction. Such a fragmented approach runs directly counter to the uniform national approach which this Court has long recognized and guarded in its jurisprudence. *The Lottawana*, 88 U.S. (21 Wall) 558 (1875); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 44 S. Ct. 302 (1924); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317 (1990).

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[6] See, generally, the discussion of James Madison, "Vices of the Political of the United States," in *The Writings of James Madison*, (Vol. 2)(G. Hunt 1901), pp. 361-369. Indeed, a strict rule which would automatically favor Americans with an American forum was expressly rejected by this Court in *M/S BREMEN v. Zapata Off-Shore Company*, 407 U.S. 1, 8-10, 92 S. Ct. 1908, 1912-1913 (1972), wherein the Court upheld the validity of a forum selection clause which compelled American interests to litigate in a foreign forum.

The doctrine of *forum non conveniens* fairly protects the rights of all maritime litigants. There is simply no efficacy in requiring that different rules be applied to identical Jones Act or maritime claims based upon the nationality of the parties.

II. Neither Personal Jurisdiction Nor Proper Venue Replace the Doctrine of *Forum Non Conveniens*

Both Miller and the Amicus, Solicitor General, urge that the establishment of personal jurisdiction over a maritime defendant coupled with proper venue of the trial court satisfies any deficiency regarding the inconvenience of the forum.[7] These arguments rely upon the "due process" requirement of minimum contacts and upon statutory venue rules to replace this maritime doctrine. However, *forum non conveniens* is never applicable unless personal jurisdiction and proper venue are established. As this Court recognized in *Gulf Oil*, "the doctrine ... can never apply if there absence of jurisdiction or mistake of venue." *Gulf Oil*, 330 U.S. at 504, 67 S.Ct. at 841.

The broad reach of personal jurisdiction under long-arm statutes within the scope of federal and state venue provisions may admit vexatious or oppressive forum selection in some instances unless the exercise of jurisdiction is tempered with the

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[7] *See:* Miller's Brief at pp 13-16, Brief of Amicus, Solicitor General, at pp. 22-23, 24-27. The rule urged by Miller and the Solicitor General would create a curious result in which maritime actors whose interests are Constitutionally protected could be subjected to vexatious and oppressive forum shopping while non-marine interests - both domestic and foreign - would be entitled to the full protection of the doctrine of *forum non conveniens* under both state and federal law. La. Code C. Proc. Art. 123; 28 U.S.C. § 1404 (West 1962); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981); *reh'g denied*, 455 U.S. 928, 102 S.Ct. 1296 (1982); *Gulf Oil, supra; Koster, supra.*

doctrine of *forum non conveniens*. Were the exercise of jurisdiction totally unrestricted in maritime actions, claimants could indiscriminantly select inconvenient fora which selection could unfairly influence the course and outcome of the litigation. *Gulf Oil*, 330 U. S. at 507, 67 S. Ct. at 842. The flexible standard of *forum non conveniens* achieves fundamental fairness by balancing the broad exercise of jurisdiction with the legitimate interests of all maritime parties. It accommodates the maritime plaintiff's choice of forum with the reasonable convenience of the parties, the availability of the witnesses, the access to the sources of proof and the interest of the forum in the dispute at hand.

III. *Forum Non Conveniens* - an Important Characteristic of Admiralty

Miller and the Solicitor General downplay the importance of the doctrine by suggesting that it is not unique to admiralty[8], that it is mere procedure which does not affect the substantial rights of the parties[9], and that uniformity in this instance is unimportant or unattainable because the doctrine is discretionary[10].

It is true that this doctrine is no longer "unique" to admiralty. This fact merely reflects its vitality and utility through its incorporation into other areas of law. As was ably stated in the brief of Amicus, Maritime Law Association (MLA), this recognition in no way undermines its importance as a characteristic feature of admiralty.[11] As noted therein, the law of admiralty has often been the precursor in the development of

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[8] Brief of Amicus, Solicitor General at pp. 14-15.
[9] *Id* at 15, 18-23; Miller's Brief at 15-16.
[10] Brief of Amicus, Solicitor General at 15-16.
[11] See, Amicus (MLA) Brief, p. 13.

principles and standards later imported or adopted by other legal regimes. This historical role of admiralty further underscores the importance of protecting and preserving its uniform application in both federal and state courts.

The argument that the doctrine is mere procedure which does not affect substantial rights overlooks the fundamental protection and fairness which the doctrine accords all maritime litigants. In a practical sense, the rule serves the valuable role of focusing litigation toward efficient and economical resolution and protecting maritime interests from vexatious forum selection and multiple adjudications of the forum issue.[12] Under the double (federal and state) standard proposed by Miller, a maritime claimant could initially select an inconvenient federal forum with practical impunity. Even if the federal court dismissed the action because of *forum non conveniens* or transferred the action under 28 U.S.C.A. § 1404, the claimant could simply refile the identical action in state court without regard to the prior federal ruling and irrespective of the convenience of the parties, the witnesses' availability, the sources of proof or the interest of the local forum. The maritime defendant would be totally

[12] *See, e.g., Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Ikospentakis, supra* at 177; *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La. App. 5th Cir.), *cert. denied*, 488 So. 2d 203 (La. 1986) *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986); *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281 (La. App. 1st Cir. 1983), *cert. denied*, 440 So.2d 731 (La. 1983), *cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984). *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976); *see also: Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985), and *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024, 111 S. Ct. 671 (1991).

powerless to require even consideration of the appropriateness of the selected state forum. However, if this Court upholds a uniform maritime standard, the legitimate interests of plaintiffs and defendants will be protected and a review of the appropriateness of the forum can be assured.

The Solicitor General argues that uniformity of maritime law is unimportant and unattainable in this instance because dismissal under the doctrine is discretionary. This contention overlooks that the goal of uniformity is that the legal standard be uniform and applied to all maritime cases, not that the result be identical. For example, maritime law compels the application of uniform rules governing such issues as Jones Act negligence[13], unseaworthiness[14], proximate cause[15], burden of proof[16], appellate review[17], etc. These standards are uniform and applicable to all maritime cases in state[18] and federal courts even though the trial judge or jury may reach different conclusions after consideration of the relevant factors in light of each applicable uniform standard. All that is sought here is the application of a uniform standard - the doctrine of *forum non conveniens* - to all admiralty cases.

[13] *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 324 (1990).
[14] *Mitchell v. The Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926 (1960).
[15] *Martin J. Norris, The Law of Maritime Personal Injuries* § 305 at 17 (3d ed. 1975) (citing, *inter alia*, *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903)).
[16] *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 77 S. Ct. 443 (1957); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942).
[17] *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6 (1954).
[18] *See, e.g. Neely v. Hollywood Marine, Inc.*, 530 So.2d 116 (La. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989); *Babineaux v. Lykes Bros. S.S. Co. Inc.*, 608 So.2d 659, 662 (La. App. 3d Cir. 1992); *Forrest v. Waterman S.S. Corp.*, 617 So.2d 59, 61 (La. App. 4th Cir. 1993).

IV. The Admiralty Doctrine of *Forum Non Conveniens* Is Consistent With the Congressional Venue Policy.

The Solicitor General suggests that *forum non conveniens* should be disregarded because of Congressional policy regarding venue selection.[19] American Dredging replies that *forum non conveniens* is totally consistent with Congressional policy favoring adjudication of disputes in fora which are convenient to the parties and witnesses. 28 U.S.C.A. § 1404. This federal transfer statute directly parallels the maritime doctrine of *forum non conveniens* and was enacted in response to the Court's ruling in *Baltimore & Ohio RR Co. v. Kepner*, 314 U.S. 44, 62 S. Ct. 6 (1941), which disallowed a *forum non conveniens* dismissal of a FELA action because of the specific venue provision in the FELA statute. *Kepner*, 314 U.S. at 53. Congress thereafter expressly authorized a transfer of all federal actions, including FELA and Jones Act claims, based upon the convenience of the parties and witnesses. *See, Revision Notes* to 28 U.S.C.A. § 1404(a). Application of the doctrine of *forum non conveniens* in Jones Act cases therefore promotes the comparable goal expressly recognized by Congress in 28 U.S.C.A. § 1404(a).

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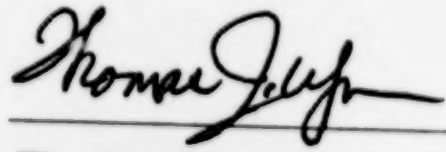
[19] See Brief of Solicitor General, pp. 24-26.

CONCLUSION

The doctrine of *forum non conveniens* is a simple rule of fairness. It promotes the legitimate interests of maritime litigants in achieving prompt, efficient and economical resolution of maritime disputes without disadvantage or favoritism to either litigant. It admirably recommends itself as a fundamental feature of maritime law.

Respectfully submitted,



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